NO. 17035

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

VS.

KENNETH EUGENE GIBBS AND RONALD CHARLES WACHS,

APPELLEES

UNITED STATES OF AMERICA, PETITIONER

VS.

HONORABLE JAMES M. CARTER, RESPONDENT

REPLY BRIEF

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REPLY BRIEF

The Brief filed by the Government in this matter is the same brief as filed by the Government in the case of U.S. vs Helen Mae Lane; U.S. vs Honorable Fred Kunzel, No. 16874. In such case, reply briefs were filed on behalf of Appellee Helen Mae Lane and on behalf of Honorable Fred Kunzel. In addition, an amicus curiae brief was filed by Howard R. Harris, attorney at law. Mr. Harris is attorney for Appellees and Respondent in the instant case.

We prefer not to repeat verbatim the arguments set forth in the foregoing reply briefs. We will state the principles of law which we believe to be applicable, but ask the Court to refer to the briefs in the prior case.

A. THE TRIAL COURT HAD THE POWER TO SUSPEND APPELLEES SENTENCES AND PLACE THEM ON PROBATION UNDER THE YOUTH CORRECTIONS ACT OF 1950.

The Youth Corrections Act is an entire system of treatment for youth offenders. No single provision may be extracted from that act and nullified. The Government admits that the Act was not repealed in whole in its application to narcotic offenders by the Narcotics Control Act of 1956. We submit that neither was it repealed in part.

It is a cardinal principle of statutory construction that repeals by implication are not favored. Where there are two acts on the same subject, effect should be given to both if possible. U.S. vs Borden Co. 308 U.S. 188–198, 84 L. Ed. 181–190, 60 S. Ct. 182.

Section 5010(a) (U.S.C., Title 18) is an essential part of the Youth Corrections Act. It is justice by whim to say that: "5010(b) and 5010(c) are fine and good, but 5010(a) obviously does not apply."

The Government makes certain statements about the "obvious" intent of Congress. First, with respect to the effect of the Narcotics Control Act on the Youth Corrections Act; secondly, whether the Youth Corrections Act created a grant of power independent of the general probation statute. We find nothing in the Narcotics Control Act, or its legislative history, which mentions or refers to the Youth Corrections Act. If Congress considered the effect of the Youth Corrections Act at the time they enacted the Narcotics Control Act, it did not say so. They did refer to the application of other statutes specifically.

As to whether Congress intended the power to grant probation under the Youth Corrections Act to be separate and apart from the general probation statute, there are provisions of 5023(a) which provides as follows:

> "Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title relative to probation."

If the contention of the Government is correct, there would have been no need to enact Section 5010(a), inasmuch as under Section 5023(a) the power of the Court to grant pro-

bation under the general probation statute is not affected by the Youth Corrections Act.

It is a duty of the Court to give effect, if possible, to every clause and word of a statute. U.S. vs Menasche, 348 Y.S. 528, 99 L. Ed. 615, 75 S. Ct. 513; Higa vs Transocean Airline, 230 F. 2d 780–784. Thus Section 5010(a) should not be construed so as to give it no meaning.

In any event Congress has not stated its intention in words specific. As stated by Judge Frankfurter in the Bell vs U.S., 349 U.S. 81, 94 L Ed. 905, 75 S. Ct. 620 ,

> "When Congress has the will, it has no difficulty in expressing it".

Congress did so specifically in enacting the 1958 amendment pertaining to young adult offenders (18 U.S.C. 4209, PL 85–752, 72 Stat. 845), and specifically precluded the application of such amendment to narcotics offenders.

It is submitted that the Court has the power to grant probation to youth offenders, though the youth offenders may have been convicted of a narcotics offense.

B. A PENAL STATUTE SHOULD BE STRICTLY CONSTRUED.

Reference is specifically made to amicus curiae brief filed in Case No. 16874, above referred to. We ask permiss-

ion to incorporate said brief by reference.

Although many of the cases cited in the amicus curiae brief refer to the definition of a crime rather than the sentencing provisions with relation to such crime, it is clear that the sentencing provisions are as essential to a criminal statute as any other provision.

In the case of U.S. vs Evans, 333 U.S. 483, 92 L. Ed. 823, the provisions of the alien harboring statute were rendered meaningless by the omission of the sentencing provisions. Thus, the general rule prevails as stated in Bell vs U.S. supra,

> "It may fairly be said to be a pre-supposition of our law to resolve doubts in the enforcement of a penal code against an imposition of a harsher punishment."

C. THIS COURT HAS NO JURISDICTION OF THIS APPEAL.

The Government's right to appeal in criminal cases is governed by 18 U.S.C. 3731. An appeal from a grant of probation is not one of the cases specified under such section. As stated by the Supreme Court in Carroll vs U.S., 354 U.S. 394, 1 L. Ed. 2d 1442, appeals by the Government in criminal cases are something unusual, exceptional, unfavored. The exceptions arethose precisely authorized by statute.

The fact that the Government has an interest in a number of sentencing problems does not give jurisdiction to the appellate court to hear an appeal by the Government. This is a legislative and not a judicial matter.

The Government sets forth cases where it was held that an appeal lies when the court purports to grant the defendant probation some time after the judgment of conviction and sentence.

In view of the Carroll case, supra, these cases should be restricted to their facts and not be enlarged.

It is obvious that the sentencing of a defendant is part of the judgment of conviction and it is not an independent act which is separately appealable under 28 U.S.C. 1291 . The Government's contention that the order of court suspending imposition of sentence in granting probation can be considered separately from the judgment of conviction is obviously erroneous. The judgments are set forth in pages 7, 8 and 9 of the transcript of record. Each entire document is entitled "Judgment". Since 18 U.S.C. 3731 does not provide for such appeal, this Court has no jurisdiction to entertain this appeal.

D. THE PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED.

Permission to use mandamus as a remedy lies within the sound discretion of the court. Mandamus should be sparingly granted and only when it is absolutely necessary in order to prevent injustice or great injury. La Buy vs Howes Leather Co., 352 U.S. 249 (1956); Ex Parte Republic of Peru, 318 U.S. 578 (1942) .

> "It has also been said that mandamus is an extraordinary remedy, available only in rare cases (Ex Parte Colleti, 337 U.S. 55, 72, 68 S. Ct. 844, 959, 93 L. Ed. 1207), and that courts will proceed with great caution before granting relief in the nature of mandamus." Laughlin vs Reynolds, 90 U.S. App. D.C. 414, 198 F. 2d 363."

United States vs Carter, 270 F. 2d 521 at 524(9th Cir. 1959).

In the instant case, the defendants were sentenced on May 16, 1960. The motion for leave to file a petition for writ of mandamus was not filed until October 15, 1960, five months later.

Both defendants had never been in trouble with the police officials previously Between the time of conviction and the time of sentence, appellee, Ronald Wachs was married. There is nothing to indicate that both have not been complying strictly with all probationary orders. Both boys are on their

way to rehabilitation. Incarceration at this time would be a grievous miscarriage of justice. (Tr. p. 30)

The Government may contend that it was perfecting its appeal during the intervening period. "Dragging their feet" would be more appropriate description.

Notice of appeal was filed by the Government on June 3, 1960. (Tr. p. 15,16) From that time until July 8, 1960, nothing was done to perfect such appeal. On July 8th, the Government moved to extend the time within which to file the record on appeal, to September 1, 1960. (Tr. p. 17, 18) The reason for the extension was not that the transcript was lengthy, or that it could not be prepared by the clerk in adequate time; on the contrary, the record is quite brief, as appears from the 36 pages of the transcript. The Court granted the order extending time; (Tr. p. 19, 20) however, appellees moved to set aside the order extending time. (Tr. p. 21,22) The Court heard the matter on July 20th and modified the order of court to give the government until August 1,1960, in which to doc - ket the record on appeal. (Tr. p. 23) The Government designated the record on appeal the following day on July 21, 1960. This could just as well have been done on June 4, 1960.

Actually, had the government proceeded promptly, the instant case could have been heard with that of the Lane case, No. 16874.

The situation is not substantially different than in the case of U.S. vs Carter, supra. It is respectfully submitted, that the petition for the Writ of Mandamus should be denied.

Respectfully submitted,

Howard R. Harris

Attorney for Appellees and Respondant